Brief

H. WELLS [illegible],
Petitioner,

vs.

THE FIRST NATIONAL BANK OF [illegible],
Respondent.

Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

THEODORE M. KNEELAND,
CHARLES E. MITCHELL,
Of Counsel.

[illegible]

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 280.

H. DRUSILLA MITCHELL, *Petitioner.*

VS.

THE FIRST NATIONAL BANK OF CHICAGO, *Respondent.*

Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

STATEMENT OF FACTS.

A co-partnership, Morse, Mitchell & Williams, of which George H. Mitchell, of Bristol, Connecticut, was a member, located and in business at Chicago, Illinois, was indebted, in February, 1891, to the respondent, The First National Bank of Chicago, more than twenty thousand dollars, which indebtedness was thereafter reduced to $16,500.

On February 20, 1891, the respondent bank demanded security for the indebtedness, and said partnership agreed to procure a guaranty of the same from the petitioner, the wife of said George H. Mitchell, then at her domicile in Connecticut.

The guaranty, Record p. 6, was then filled out on a blank of the respondent bank, signed by said partnership and its individual members, at Chicago, and brought by said Mitchell to his residence in Bristol, Connecticut, where he procured the petitioner, his wife, to sign the paper, and then forwarded it, by mail, to his partner, Morse, at Chicago, who delivered it to the respondent bank.

The petitioner, at the time she signed said paper at her domicile in Connecticut, was a married woman, having been married to said George H. Mitchell, at Bristol, Connecticut, in 1857, where she then and ever since has resided; and she has been, during all her married life, under the disabilities of the common law and incapable of binding herself by contract.

Upon these facts, the Circuit Court of Appeals of the United States for the Second Circuit held that the guaranty was a valid and binding contract of the petitioner, and that she was liable for the indebtedness covered by the guaranty; while the Supreme Court of Errors of the State of Connecticut had held, upon the same facts, stated in the same words, that said guaranty was invalid and void as to the petitioner, and that the petitioner was incapable of making such a contract and that no action could be maintained against her on such contract in the State of Connecticut.

CLAIMS.

1. The alleged guaranty signed at her domicile, by a married woman, under the disabilities of the common law, is void.

2. The judgment of the state court in *Freeman's Appeal* was a final adjudication of the questions at issue in this case, and was binding and conclusive upon the parties to this action.

3. The laws and adjudications of the State of Connecticut are rules of decision in trials at common law in the federal courts having jurisdiction in the state, and should have been regarded as controlling in this case by the Circuit Court of Appeals.

4. The capacity of a married woman to execute a contract is determined by local law, by the law of the place of her domicile, or where she is sojourning.

5. The alleged contract of guaranty transgresses the laws of the State of Connecticut, and cannot be enforced by an action in any court having jurisdiction in the state.

6. No notice having been given of the acceptance of the guaranty by the respondent, it would not be binding upon Mrs. Mitchell, even if it could be validated by the law of the place of performance. The contract of waiver made at her domicile was void.

I.

Mrs. Mitchell, as a married woman, was under the disabilities of the common law when she signed the guaranty in suit at her domicile in the state of Connecticut. This was conceded in the court below.

The opinion of the Supreme Court in *Freeman's Appeal from Commissioners*, (Record, p. 32) *68 Conn. 533*, fully states the law. Speaking of Mrs. Mitchell, the court said:—"Her marriage gave her, under the laws of the state then in force, substantially the *status* which belonged to a married woman at common law. Her personal identity from a juridical point of view was merged in that of her husband. Thereafter, during coverture, she could make no contract that would be binding upon her. *I. Swift's Digest, 30.* If she assumed to make such a contract, it was absolutely void." "Whenever a peculiar *status* is assigned by law to the members of any particular class of persons, affecting their general position in or with regard to the rest of the community, no one belonging to such class can vary, by any contract, the rights and liabilities incident to this *status*." "Coverture constitutes such a *status*, and one of its incidents in this state at the time of Mrs. Mitchell's marriage was a total disability to contract."

The court also said that appointing an agent was entering into a contractual relation, and added:—"Engagements which coverture prevents a woman from making herself, she cannot make through the interposition of an agent whom she assumes to constitute as such in the state of her domicile. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts."

This was a statement of the existing law, and follows a long line of decisions which hold that the contracts of married women in that state are void.

Jackson *vs.* Hubbard, 36 Conn. 10, 15.
Platt *vs.* Hawkins, 43 Conn. 139.
Bank *vs.* Smith, 43 Conn. 327.
Smith *vs.* Williams, 43 Conn. 409, 418.
Way *vs.* Peck, 47 Conn. 23.
Gore *vs.* Carl, 47 Conn. 291.
Kilbourn *vs.* Brown. 56 Conn. 149.

In 1877, a statute was passed authorizing women thereafter maried to make contracts as if unmarried.

The *status* of Mrs. Mitchell, who was married in 1857, was not affected by this statute. *Freeman's Appeal*, (Opinion, Record, p. 32).

The alleged contract of guaranty by Mrs. Mitchell was not only void when signed by her at her domicile, but could not be made valid by any act of herself or any one else while she remained under the disabilities of the common law.

II.

The respondent originally brought its action in a federal court in the State of Connecticut to recover upon the alleged guaranty. (Record, p. 2). Nothing could or did prevent its prosecution of the action in that court until final judgment was reached. *Voluntarily*, it turned from that forum to the courts and proceedings of the State of Connecticut, and of its own volition, without compulsion of any kind, presented for adjudication in the state tribunals the questions and issues it was already litigating in the federal court.

It presented its claim under the guaranty to the commissioners on the insolvent estate of Mrs. Mitchell, and the claim was allowed. The trustee of the insolvent estate appealed from the action of the commissioners to the Superior Court, a court of general jurisdiction, and, thereby, vacated the judgment of the commissioners. In *Cothren's Appeal 59 Conn. 545, 548,* the court says:—"The commissioners on an insolvent estate are a legal tribunal with certain limited equitable powers, and on an appeal from their doings the judgment below is vacated, and the trial in the Superior Court is entirely independent of any action of the commissioners. It is wholly a trial *de novo.*" The judgment of the Superior Court on such appeal has the same effect as a judgment in any civil action, and is conclusive as to all matters which are in issue and determined.

> See note, Loomis *vs.* Eaton, 32 Conn. 552, approved in First National Bank *vs.* Hartford L. & A. Ins. Co., 45 Conn. 22, 42.

Under the Rules of Practice of the courts of Connecticut, the respondent, if it prosecuted its claim in the Superior Court, was required to file in that court a statement which should conform in form and substance to a complaint in a civil action, to which answer was to be filed and issues joined as in civil actions 58 Conn. 588, §5.

Statement and answer were filed and issues joined as required by such rules. (Record, p. 22). The pleadings thus made in the state court presented issues identical with those presented in the federal court, and the same facts, stated in the same phraseology, were agreed upon as the facts to be used in either forum.

The respondent permitted its case in the federal court to lie dormant while it pressed its case in the state courts to trial, and finally caused the issues presented to be passed upon by the court of last resort in the state, the Supreme Court of Errors. The decision of that court being adverse, the respondent returned to the federal court to again try the questions and issues decided in the state court, and to have, practically, the decision

of the Supreme Court of Errors of Connecticut reversed; first, by the United States Circuit Court, and, failing there, then by the United States Circuit Court of Appeals.

The respondent chose its forum, and has had its day in court, and ought not now, to be permitted to re-try the issues which have been judicially determined by a court of its own selection.

Stout *vs.* Lye, 103 U. S. 66, 71.
Grant *vs.* Buckner, 172 U. S. 232, 238.

The United States Court of Appeals assumed not only to re-try the issues, but, in effect, to declare the decision of the highest court of Connecticut erroneous, and to over-rule and set aside its judgment.

The state court having said the respondent had no cause of action and rendered judgment accordingly, the federal court reverses that judgment and directs judgment to be rendered for the respondent for the amount claimed in the state tribunal, and which it was not permitted to recover there.

As we understand the position of this court, as declared in *Forsyth vs. Hammond, 166 U. S. 506, 518*, a litigant who chooses his tribunal must abide by its conclusions, and is not at liberty, thereafter, to present the same issues in another forum in disregard of, and for the purpose of reversing the action of the selected court.

Even where the form and cause or action are different, the decision of any essential fact or question in one action is conclusive between the parties in all subsequent actions.

Cromwell *vs.*Sac County, 94 U. S. 351.
Lumber Co. *vs.* Buchtel, 101 U. S. 638.
Nesbit *vs.* Riverside Independent District, 144 U. S. 610.
Johnson Co. *vs.* Wharton, 152 U. S. 252.
Last Chance Mining Co. *vs.* Tyler Mining Co. 157 U. S. 683.

The decision of the Supreme Court of Errors in Freeman's Appeal was, practically, between the same parties upon the

same issues and was a final adjudication, and should have been respected as binding and conclusive upon the principle of *res-judicata.*

Forsyth *vs.* Hammond, 166 U. S. 520.

III.

If however, the questions in this case are still open for adjudication by the federal court, that court is required to regard the law of the State of Connecticut as the rule for its decision.

U. S. Rev. Stat., Sec. 721.

The action was not only begun and tried in a federal court sitting in that state, but the alleged cause of action had its origin within the state.

Mrs. Mitchell was a citizen of Connecticut, where she had the *status* of a married woman at common law. Whatever she did in relation to the alleged guaranty was done at her domicil in that state. It was the prerogative of that sovereignty to define her condition as to capacity or incapacity to do any act within its jurisdiction.

Story on Conflict of Laws, § § 64, 65, 66, 136.
Male *vs.* Roberts, 3 Esp. 163.
Hyde *vs.* Goodnow, 3 Coms. (N. Y.) 266.
Bank of Louisiana *vs.* Williams, 46 Miss. 618.
Union National Bank *vs.* Hartwell, 84 Ala. 379.
Dow *vs.* Gould & Curry, S. M Co., 31 Cal. 629.

This court has invariably held under like circumstances that it was the duty of the federal court to hold and administer

the law upon the subject as if it were sitting at a local court of the state.

Olcott *vs.* Bynum, 17 Wall. 44, 58.
Slaughter *vs.* Glenn, 98 U. S. 242, 245.
Taylor *vs.* Ypsilanti, 105 U. S. 60, 91.
Bucher *vs.* Cheshire R. R. Co. 125 U. S. 555.
Burgess *vs.* Seligman, 107 U. S. 20, 34, and cases cited in note.

The law of Connecticut, which declares the act of Mrs. Mitchell, in signing the guaranty, void, has existed from the first and was binding and conclusive in the federal court as well as in the state court, and the United States Circuit Court of Appeals erred in holding otherwise.

IV.

It is admitted that Mrs. Mitchell, a married woman, could not bind herself by signing the writing in suit at her domicil in Connecticut. Such attempted contract, void at its inception, could not be made a contract by delivery by a third person within that state. But it is said that such paper being sent to a third person in Illinois, where married women are authorized by statute to contract, may, by the act of such third person in delivering it there, become a valid contract.

This assumes that Mrs. Mitchell's personal presence in the State of Illinois is unnecessary to the possession and exercise of the powers conferred by its statutes upon married women, and that such statutes have an extra-territorial effect. It also assumes that she had power to enter into a contract appointing an agent, notwithstanding her utter incapacity to contract by the law of her domicil where such appointment was claimed to have

been made. It also assumes that she could confer upon such agent a capacity not only greater but one not possessed by his principal.

It is to be noted that it is not claimed that this agent was authorized to make a contract for Mrs. Mitchell under the statutes of Illinois; but only to deliver, as a contract already executed, the paper signed by her in Connecticut.

If these assumptions and claims are sound, then a person legally incapable may do that indirectly which he cannot do directly. This the law will not permit, especially in the case of married women and infants under common law disability. The disqualification is imposed upon them from motives of public policy.

Keen *vs.* Coleman, 39 Pa. St. 299.
Lowell *vs.* Daniels, 2 Gray 168.
Bodine *vs.* Killeen, 53 N. Y. 96.
Liverpool Adelphi Loan Asso., *vs.* Fairhurst 9 Exch. 422, 429.

Nor will the claim that the alleged contract was to be performed in Illinois avail to give it validity. The capacity of Mrs. Mitchell to contract while at her domicil is determined by the law of her domicil. *Story*, on *Conflict of Laws*, § *64*.

By reason of her disability, she was incapable of giving an effectual consent to the alleged contract. The intent of a married woman, not *sui juris*, cannot be considered in determining the locality, validity, extent, or force of any contract she may attempt to make. In the language of the court in Hager *vs.* National German Bank, 105 Georgia, 116, 119, "the laws of the place of performance of a contract cannot be called to the aid of a person who is seeking to enforce, as a contract, something which is absolutely void at the place where it was executed."

Yale *vs.* Dederer, 22 N. Y. 450.
Cooper *vs.* Cooper, 13 App. Cases L. R. 88.

In the last case, an infant domiciled in Ireland executed there an ante-nuptial contract, with the intention, upon her marriage, of removing immediately to Scotland, where she had capacity to make such contract, and of residing there permanently. Upon marriage, she removed to Scotland and resided there during her married life. *Held*, that the capacity of the appellant to bind herself must be determined by the law of her domicil, and that by that law, she could not, as an infant, incur an obligation that was not shown to be for her benefit, and that she was not bound by the contract. Halsbury L. C. p. 99, said: It is said that the familiar exception that the law of the place where a contract is to be performed governs it, prevents the application of the general rule, and that as both parties contemplated a Scottish married life, and, as a consequence, a Scottish domicil, the principle I have stated does not regulate the contract relation of these parties. The overwhelming answer to this is that the argument assumes a binding contract, and, if one of the parties was under incapacity, the whole foundation of the argument fails. Lord Watson added, p. 106, "The principle of private international law which makes, in certain cases, the law of the place where it is to be performed the legal test of the validity of a contract, rests, in the first place, upon the assumption that the parties were, at the time they contracted, both capable of giving an effectual consent; and in the second place upon an inference derived from the terms of the document, or from the circumstances of the case that they mutually agreed to be bound by the *lex loci solutionis* in all questions touching its validity. This principle can have no application where one of the parties, at the time when they professed to contract, was incapable of giving consent by the law of the party's domicil and also of the place of contracting." Lord Macnaghten, p. 108, "It is difficul to suppose that Mrs. Cooper could confer capacity upon herself by contemplating a different country as the place where the contract was to be fulfilled or contracting in view of an alteration of personal *status* which would bring with it a change of domicil."

The English law, as stated in *Cooper vs. Cooper*, is identical with the rule universally recognized in this country.

Hager vs. Bank 105 Ga. 116, was an action upon a note dated at St. Paul, Minn., and payable at defendant bank in said St. Paul, and was signed, as surety, by the plaintiff, at her domicil in Tennessee, she being a married woman under common law disabilities. The court held that the capacity of the defendant to bind herself by a contract of the character under consideration must be determined by the law of Tennessee. She was domiciled in that state, and the note sued on was executed there. "A married woman incapacited by the law of her domicil to bind herself by a promissory note cannot be made liable on such a note because of the fact, though executed at the place of residence, it was made payable in another jurisdiction where she would be authorized by the law to make such a contract."

In *Pearl vs. Hansborough and wife, 9 Humph. 426, 431*, the court states the fact as follows: Mrs. Hansborough being a *feme covert* did, on May 9, 1843, *in the County of Williamson, State of Tennessee*, contract with her father, Ewen Cameron, to buy of him the five slaves in controversy, and, in pursuance of such contract, she did execute to him her notes; one, for five hundred dollars, and one for seven hundred and fifty dollars; as a consideration for the deed to her of said slaves, etc. Although by the law of Mississippi, where Mrs. Hansborough was domiciled, she might have made such contract, the court says, p. 435, the whole contract is void and no rights have been acquired by any one under it. The contract was made in Tennessee where a *feme covert* is incapable of contracting, and all her contracts are void.

So in *Wright vs. Remington, 41 N. J. Law, 48*, it was held that a contract signed by a married woman at her domicile in Illinois, where, by statute, she was authorized to make such contract, was valid and could be enforced in New Jersey, although if she had been domiciled and had signed the contract in the latter state, it would have been void. The law of Illinois, the

law of domicil and place of contracting, determined the capacity of the married woman, and the validity of the contract.

See also Thompson *vs.*Ketcham, 8 Johns (N. Y.) 189.
Andrews *vs.* Herriott, 4 Cowen 570 (N. Y.)
Hill *vs.* Pine River Bank, 45 N. H. 300.
Bank of Louisiana *vs.* Williams, 46 Miss. 618.
Dow *vs.* Gould & Curry S. M. Co., 31 Cal. 629.
Union National Bank *vs.* Hartwell, 84 Ala. 379.
Gibson *vs.* Sublett, 82 Ky. 596.
Robinson *vs.* Queen, 87 Tenn. 445.
Spearman *vs.* Ward, 114 Pa. St. 634.
Wood *vs.* Wheeler, 111 N. C. 231.
Armstrong *vs.* Best, 112 N. C. 59.
Ruhe *vs.* Buck, 124 Mo. 178.
Bank *vs.* Partree, 99 U. S. 325, 330.
Freeman's Appeal, 68 Conn. 533.

In all these cases, the doctrine stated in Story on *Conflict of Laws*, § *64*, that the validity of the acts of a married woman at her domicil are determined by the law of her domicil is approved. In some of them it is said that her *status* at her domicil does not accompany her to another jurisdiction, and that the validity of her acts and contracts while personally in a foreign country are determined by the laws of that country. The divergence in the views of commentators on private international law relates solely to this latter proposition.

Story, Conflict of Laws, §§ 66, 66a, 136, etc.
2 Kent's Commentaries 233 note, 458, 459 note.

The opinion in *Milliken vs. Pratt, 125 Mass. 374*, discusses this question whether the law of domicil or that of sojourn shall determine the capacity of infants and married women, and cites numerous cases to show that it is determined by the law of the place of personal sojourn and action. The cases cited all sustain the contention of Mrs. Mitchell, and where their facts are analogous are cited upon this brief. That case, decided in 1878, turned upon the effect of a statute of Massachusetts, removing the common law disabilities of married women, on an attempted contractual act of a married woman at her domicil

in the state, prior to its enactment. The question related to an act of a citizen of the state within its territory, the legislation and policy of the state, and was entirely local in its character. The court says:—"In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings; and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action." The existence and force of the rule for which we contend is stated, p. 383. "It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." It is proper to remark that in *Milliken vs. Pratt* no authorities are cited to sustain the proposition that an incapable person can sign a paper at her domicile, where she is incapacitated, and, by sending it to another state, by mail or messenger, make it a valid contract. The cases which are cited all relate to persons possessing capacity to contract at the place where the paper is signed.

A large number of the cases cited by us are much more recent than *Milliken vs. Pratt*, and state the rule more clearly and emphatically, and fully sustain the position of the Supreme Court of Connecticut in *Freeman's Appeal.*

In no instance has a court of last resort, in any state, taken any other view than that for which we contend. The cases of *Baum vs. Birchall, 150 Pa. St. 164*, and *Hill vs. Chase, 143 Mass. 129*, cited by the respondent are not in point as they present the question whether an incapable married woman was

liable upon contracts for the benefit of herself or her estate. The first case held that an incapable married woman who purchased and had conveyed to her a farm in Delaware was liable on a bond she had given for the purchase price. The other case held that an incapable married woman who borrows money for her own use is liable for the amount in an action at law in Massachusetts. In each case, the liability could have been established under the common law by a proceeding in equity.

We have omitted mention of *Bell vs. Packard, 69 Me. 105*, because the case turns upon allegations of fraud on the part of the married woman. That the decision was an arbitrary exercise of judicial power is shown by its concluding paragraph. The court speaking of a letter to the husband of the incapable married woman says:—"The plaintiff's letter called for a 'good surety' to the note. By the execution and delivery of it, the makers must be presumed to have intended a *bona fide* and not a *mala fide* compliance with the proposition. But if the note was made in Massachusetts, and intended to be payable there, then it was illegal and void, and an intended fraud by the makers, since they must be presumed to know the law of their domicile; whereas, if made or intended to be paid in this state, it would be legal and valid. It should, therefore, in the absence of any legal principle forbidding it, be considered as intended by the parties to have been made with reference to the place where legal." This ground for the liability of an incapable married woman has not been stated by any other common law court, and contravenes the accepted rule stated in *Liverpool Adelphi Asso. vs. Fairhurst, 9 Exch. 422.*

The respondent says that the question at issue is "whether the doing of a given act requires contractual ability, and is to be settled by the application of general principles of law in force everywhere." Obviously, if the given act resulted in, or was essential to, the making of a valid contract, as is asserted, then the doing of it requires contractual ability.

The court below says that the question is "whether the incapacity to contract by the law of the state of a person's dom-

icile attaches to his contractual act in another state where the disability has been removed." This statement assumes that Mrs. Mitchell did a contractual act in Illinois, where her disability had been removed. Mrs. Mitchell was not even transiently in the State of Illinois, when or after she signed this guaranty. Signing the guaranty was her only act, and this was done in the State of Connecticut. Her disabilities were not, and could not be removed, or even temporarily suspended by the laws of Illinois. The court must have held that the local laws of Illinois operated upon the person of Mrs. Mitchell while she was within the State of Connecticut, thus giving to those laws an extra-territorial effect.

We say the paramount question is whether Mrs. Mitchell can have the safeguards and protection which the common law provides and which the State of Connecticut has maintained for her and in her interest or whether the statute law of another State can, while she is at her domicile in Connecticut, change the *status* which its laws give her.

Illinois and Connecticut have the common law as the basis of their jurisprudence, and in each the incapacity of married women to make contracts was originally recognized. While in Connecticut their common law disabilities are in full force as to those married prior to 1877, in Illinois these disabilities have been entirely removed. If then, this contract of guaranty is valid as to Mrs. Mitchell, it must be so because the laws of Illinois confer upon her the power to make such contract or do some act from which a contract results. It is the statute law of Illinois which invades the territory of Connecticut, and practically removes the common law disabilities of its married women.

This court, upon this general question in *Grover & Baker Machine Co. vs. Radcliffe, 137 U. S. 287, 296*, cites Judge Story with approval, as follows:—"No sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is mere nullity, and incapable of binding such persons or property in other tribunals. Such is

the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between states which were to remain as independent of each other, for all but national purposes, as they were before the revolution. Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty."

V.

If, however, the court should be of opinion that the questions in this case are open, and that the alleged contract was constructively made or was to be performed in Illinois and by the operation of the laws of that state was a valid contract, binding upon Mrs. Mitchell, then arises the question whether a recovery can be had thereon in a federal court sitting in Connecticut.

This court said in *Cooper Manufacturing Co. vs. Ferguson 113 U. S. 727, 733*:—"It must be conceded that if the contract on which the suit was brought was made in violation of the law of the state, it cannot be enforced in any court *sitting in the state* charged with the interpretation and enforcement of its laws."

The Supreme Court of Connecticut said in regard to this question in *Freeman's Appeal 68 Conn. 533, 542*, (Record, p. 35): —"No principle of comity can require a state to lend the aid of its courts to enforce a security which rests on the transgression of its own laws, by one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do."

The Connecticut Court in that opinion followed the rule stated in *Reynolds vs. Geary, 26 Conn. 179, 183*:—"Giving in this state effect to the laws of another state or foreign country is wholly an act of comity and not a recognition of a right. This comity will not be extended here if the foreign law or contract is prohibited here, or is contrary to the policy of our laws. We cannot give to the citizens of another state any higher privileges than we give our own citizens."

Comity is an act of courtesy on the part of the state, and can be extended in the courts of the United States only with the consent of the state and when its exercise is consistent with the interests and policy of the state.

In *Bank of Augusta vs. Earle, 13 Pet. 519, 589*, this court held, citing Story on "Conflict of Laws," that it was not comity of the courts but the comity of the state which is administered, and ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided. It is the voluntary act of the state by which it is offered, and inadmissible when contrary to its policy or prejudicial to its interests.

In *Mahon vs. Justice, 127 U. S. 700, 706*, this court says:—"By comity nothing more is meant than that courtesy on the part of one state by which, within her territory, the laws of another state are recognized and enforced, or another state is assisted in the execution of its laws. From its nature, the courts of the United States cannot compel its exercise when it is refused by the state; it is admissible only upon consent of the state, and when consistent with her own interests and policy.

In the state of Illinois, the same rule prevails. In *Pope vs. Hanke, 155 Ill. 617, 628*, the court says:—"Comity between different states does not require a law of one state to be executed in another state when it would be against the public policy of the latter state. No state is bound to recognize or enforce contracts which are injurious to the welfare of its people or which are in violation of its own laws;" quoting *Faulkner vs. Hyman, 142 Mass. 53, 54* where the court, Devens, J. says:—"The law

of any state has no force or effect, *proprio vigore*, beyond its territorial limits. Whatever extra-territorial validity it may have is owing to the comity which should prevail between different states or nations. That comity does not require that it should be executed when it would be against the public policy of the state where the remedy is sought, or would be injurious to the just interests of its citizens."

In *Rhodes vs. Missouri Loan and Savings Co. 173 Ill. 621*, the court says:—"The rule of comity does not require that we should allow foreign corporations to enforce contracts here, if such enforcement would be in conflict with our laws, and, being thus in conflict, the enforcement thereof would work against our own citizens, and give to the citizens of another state an advantage which the resident has not." Then again the court says:—"Comity does not take place by any foreign state when it would be incompatible with its own authority or prejudicial to the interests of its own subjects."

Dawes *vs.* Rosenbaum, 179 Ill. 112.

The cases which follow state the same rule.

In *Saul vs. His Creditors, 5 Martin, N. S. 569*, the Louisiana court said:—"Contracts cannot be enforced to the injury of a state whose aid is required to carry them into effect; nor where they are in opposition to the laws of that state. In the conflict of laws where it is doubtful which should prevail, the court that decides should prefer the laws of its own country to that of a stranger."

In *Hayden vs. Stone, 13 R. I. 106*, the court says:—"A contract valid by the laws of one state cannot be enforced in another, unless such a contract made between its own citizens could be enforced there. Any other doctrine would produce confusion, some persons and acts being regulated by local laws and some by foreign laws."

See also Case *vs.* Dodge, 18 R. I. 661.

In *Ruhe vs. Buck, 124 Mo. 178*, already cited, the court says:—"The spirit of comity does not require that a non-resident shall be allowed a remedy which is, by the policy of the state law, denied to its own citizens."

In *Armstrong vs. Best, 112 N. C. 59*, the court says:—"The common law disabilities of married women still obtain in this state, and her promise is as void as it ever was, except in cases provided by statute. If the contract which is the subject of the action was made in this state, it would be void. The contract was, undoubtedly, valid in the state where made, but it cannot be enforced here because of a very important qualification of private international law; and this is that no state or nation will enforce a law which is contrary to its fixed and settled policy."

In many of the cases cited, the issue related to married women under common law disabilities, or where that disability had been modified by statute, and fully support our contention. Even in the case of *Miliken vs. Pratt, supra*, the rule, as stated, is recognized, and it is declared that it would be binding and conclusive in states such as Connecticut, where the common law disabilities of married women are in force. The deduction from all the foregoing cases is that if the alleged guaranty is valid and binding upon Mrs. Mitchell it cannot be enforced against her in any court having jurisdiction in the state of Connecticut.

VI.

There was no notice to Mrs. Mitchell by the bank of the acceptance of the proposed guaranty or of credit given under it.

The writing signed by Mrs. Mitchell was in the nature of a request to the bank to continue credit to the firm of Morse, Mitchell & Williams. It reads:—

"We hereby request the First National Bank of Chicago to give and continue to Morse, Mitchell & Williams credit as they desire from time to time," and then it states that, "in considera-

tion of all and any such credit given, we hereby guarantee any and all indebtedness now due or which may hereafter become due," etc.

To make the contract of guaranty binding upon Mrs. Mitchell, there must have been an acceptance of the request on the part of the bank, and notice of such acceptance, and notice, also, of credit given under it.

Craft *et al vs.* Isham, 13 Conn. 28.
New Haven County Bank *vs.* Mitchell, 15 Conn. 206.
Adams *vs.* Jones, 12 Pet. 207.
Cooke *vs.* Orne, 37 Ill. 186.
Davis *vs.* Wells, 104 U. S. 159.
Davis Sewing Machine Co. *vs.* Richards, 115 U. S. 524.

There are only two possible grounds upon which notice of such acceptance to Mrs. Mitchell could be dispensed with. One is, that prior negotiations had been had between the bank and signers of the guaranty, which made such notice unnecessary; and the second is, that there was an express waiver of such notice in the contract itself.

It is true that the record finds that the bank had agreed with the firm of Morse, Mitchell & Williams to continue the line of credits upon the execution of the guarantee by said firm and its individual members and by Mrs. Mitchell; but this agreement was not made with Mrs. Mitchell, a stranger to the firm, nor does the record find that it had ever been communicated to her by anybody. So far as she is concerned there is a simple request contained in the instrument itself to give credit, and no knowledge or intimation as to whether it will be complied with or not.

The bank, who prepared the guaranty, knew of the necessity of notice of acceptance, and therefore provided in the instrument itself that the signers should

> "waive notice of the acceptance of the guaranty and of any and all indebtedness at any time covered by the same."

Here, then, we have a contract within a contract; a contract of guaranty and a contract of waiver. Mrs. Mitchell was in Connecticut when she attempted to make the contract of waiver, and in the absence of the waiver, notice would have had to be given her in Connecticut of acceptance, for this was the place of her domicile, and the place where she actually was. This part of the contract could not be made anything else than a Connecticut contract. By the law of Connecticut, the contract of waiver was void, for a married woman nad no power to make any such waiver, and if the waiver itself was void, then the whole contract falls for want of acceptance and notice.

We submit that the Circuit Court of Appeals erred in holding that the decision by the Supreme Court of Errors of Connecticut in *Freeman's Appeal* was not in harmony with cases in other jurisdictions; that the judgment in *Freeman's Appeal* was not conclusive upon the parties in this case; that the federal courts having jurisdiction in the state in a common law action could disregard the laws of the state and could exercise comity where it was refused by the state and its courts.

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